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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 319

CARIBBEAN FEDERATION LINES,
Petitioner,

versus

KARL DAHL and HJALMAR WIIK,
Appellees.

Brief of Appellees in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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STATEMENT OF THE CASE

In addition to the statement of the case as outlined by the Petitioner, Appellees respectfully submit the following:

There is only one contract of employment on each of the Appellees. It is for the one year period beginning November 15, 1958, terminating November 15, 1959. The engagement was for the Gulf Trade – West

Indies and Overseas Trade and could be terminated by either party upon giving fourteen days notice after one year (R63, Libelants' Exhibit 1).

The SS AMIGO was never engaged in trade between the United States and the British North American Possessions. It had never taken on a single article of cargo for Canada. The vessel after it had discharged its cargo from South America in Pascagoula, Mississippi proceeded to Mobile "where we were entering into a contract to carry creosote railroad ties from Mobile, Alabama to Seven Rivers, Canada" (R74). They were unable to get an extension of time within which they "could commence to carry" the ties (R76).

The SS AMIGO at the times in question was a Liberian flag vessel owned by Caribbean Federation Lines, which in turn was owned in its entirety by Raul Slavin, a citizen of Argentina (R89, 90).

ARGUMENT

POINT I

Findings of fact of the District Court should not be reversed unless clearly erroneous.

It is established law that the findings of fact of the District Court should not be reversed unless clearly erroneous. Further, it is upon the Petitioner to show that such findings were clearly erroneous. *McAllister v. The United States*, 348 U.S. 19, 99 L.Ed. 20.

It is obvious upon reviewing the evidence that what happened in this case was simply as the Court below has found. That is, that the Appellees were signed to a one year contract by the Master of the SS AMIGO for service in the Gulf Trade – West Indies and Overseas Trade; brought to the United States where they joined the vessel in Pascagoula, after the vessel finished discharging at Pascagoula it came on to Mobile; that shipping was bad and the vessel's owners could not obtain cargo for the vessel. Thereupon they decided to discharge the men and return them to Norway. The Appellees reported to the Petitioner's office in New York and their wages were tendered them upon the condition that they sign a full and complete release of any and all claims. After some time had elapsed the Immigration Authorities persuaded the Petitioner to repatriate the men. The Petitioner to this date has never offered to pay the Appellees wages that were due them upon discharge without the condition of release. We respectfully submit that the Findings of Fact of the Court below are entirely proper and that most certainly they are not clearly erroneous.

POINT II

A defense not set up in the answer may not be urged on Appeal.

The answer of Petitioner to Appellees' claim for penalty wages under 46 U.S.C.A. 596 is but a general denial (R27). At no time during the trial of the cause in the District Court or in arguments to that Court was it urged by the Petitioner that Appellees were not

entitled to recover due to the restrictive conditions set out in 46 U.S.C.A. 544. It was urged for the first time on Appeal to the Fifth Circuit Court of Appeals that (1) the vessel was engaged in a coastwise voyage at the time in question, or (2) that it was engaged in the trade between the United States and the British North American Possessions, and thus Appellees do not come under the provisions of 46 U.S.C.A. 596. These are clearly affirmative defenses and if not pleaded, should not be considered on appeal. *Benedict on Admiralty*, Sixth Ed., Vol. 4, Sec. 573; *McAllister v. The United States*, 348 U.S. 19; 99 L. Ed. 20, *Federal Rules of Civil Procedure*, Rule 52 (a), *Commerce Oil Corp. vs. Dixie Carriers*, 252 F. 2nd. 386.

POINT III

A foreign owned vessel is prohibited from engaging in the coastwise trade.

The SS AMIGO was a Liberian flag vessel owned by Caribbean Federation Lines, which in turn was owned by Raul Slavin, a citizen of Argentina. The SS AMIGO moved no cargo in the coastwise trade, nor was it ever engaged in the coastwise trade. 46 U.S.C.A. 883, 808 and 11 prohibit such a vessel from engaging in the coastwise trade.

There was only one contract of employment in existence by and between the Appellees and the Petitioner. This contract was for a period of one year for service in the Gulf Trade – West Indies and Overseas Trade. The Appellees were bound by their con-

tract of employment or Articles of Employment to sail with this ship to any parts of the world directed by the Petitioner. The vessel was prohibited by law from engaging in a coastwise trade and there has been absolutely no finding that it was so engaged. Therefore, this decision could in no manner be considered as being in conflict with *Gardner* v. *L. N. Danzler*, 281 F. 2nd. 719.

Assuming for the sake of argument that the vessel was considered to be in the coastwise trade, it is respectfully submitted that the case of *Carson v. Gulf Oil Corporation*, 123 So. 2nd 35, distinguishes the instant case from the *Gardner* case, and in fact, no conflict would exist.

POINT IV

The SS AMIGO was not engaged in trade between the United States and the British North American Possessions.

The contracts of employment of the Appellees were for a period of one year in the Gulf Trade – West Indies and Overseas Trade, and they were bound to the vessel for a period of one year for any place in the world where the vessel was ordered to go. Not one ton of cargo was loaded aboard the SS AMIGO for Canada. True, the Petitioner alleges that it had planned to carry a cargo to Canada. However, this contract was never entered into and as the shipping business was bad at the time, no cargo being available for the vessel for any ports in the world, it was decided to lay up the vessel. The position of the

Petitioner is clearly inconsistent with the facts of the case.

Assuming only for the sake of argument that the Petitioner could successfully maintain that the Appellees were on articles between Canada and the United States, then again, the Appellees insist that the Petitioner's position would again meet with failure. Congress amended 46 U.S.C.A. 596 in 1898 by interpolating a provision for coasting voyages before the provisions for voyages between Atlantic and Pacific ports and foreign ports. It is respectfully submitted that this Amendment intended to bring within Section 596 all coastwise voyages or coasting voyages, including voyages along the coast of the United States and Canada. For if such were not the intention of Congress we would find ourselves in this position: Section 596 would apply in a coastwise voyage from Jacksonville to New Orleans; it would apply to a coastwise voyage from Houston to New York or in a coastwise voyage from the Pacific coast to New York, but Section 596 would not apply in a voyage from Houston to Quebec and it would not apply in a voyage from San Francisco to Quebec. We can find no authorities interpreting Section 596 as amended in respect to its applicability to coasting voyages between the United States and Canada. However, it is respectfully submitted that Congress in its amendment of 1898 intended to bring such voyages within the Act.

POINT V

Appellees are within the class of seamen entitled to recover wages under 46 U.S.C.A. 596.

The findings of the District Court sitting without a jury in Admiralty, should not be reversed unless clearly erroneous. *McAllister v. United States*, supra. It is abundantly clear from the record that Appellees are entitled to penalty wages under Section 596. *The Fletero v. Arias*, 206 Fed. 2nd.267, Certiorari Denied, 346 U.S. 896; *Prindes v. The SS AFRICAN PILGRIM*, 266 Fed. 2nd. 125; *Mandelin*, et al v. *Kenneally*, et al, 11 Fed. 2nd. 344; *Forster v. Oro Navigation Co.*, 128 Fed. Supp. 113.

POINT VI

The Petition for Writ of Certiorari fails to affirmatively establish the requisite, special and important reasons for the granting of same.

Paragraph 1 of Rule 19 of Supreme Court Rules, 28 U.S.C.A., provides that a review on Writ of Certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are "special and important reasons therefor." The category of "special and important reasons" has been held to be those which "imply a reach to a problem beyond the academic or episodic," *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1955). The Petitioner states nothing in the Petition for a Writ of Certiorari which comes within the category of "special and important reasons" for the granting of same.

CONCLUSION

It is felt that it has effectively been shown that no conflict exists in this case or could exist under the facts of this case with any other decision of the Court of Appeals. In addition, it is submitted that the Petition falls in its entirety in its efforts to establish any special and important reasons for the granting of same. It is therefore respectfully requested that the Petition for Writ of Certiorari be denied.

DIAMOND, ENGEL & LATTOF

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Of Counsel

AFFIDAVIT OF SERVICE

I, Ross Diamond, Jr., Proctor for Appellees, depose and say that on the _____ of August, 1963, I served a copy of the foregoing Brief in opposition to Petition for Writ of Certiorari on the Petitioners herein by delivering a copy of same to Harry H. Riddick, counsel of record for said Petitioner, at his office in the American National Bank Building, Mobile, Alabama.

_____

Ross Diamond, Jr.

Subscribed and Sworn to before
me at Mobile, Alabama, this ___
day of August, 1963.

_____

NOTARY PUBLIC, MOBILE COUNTY, ALABAMA